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84-1672

~~NO.~~ 84-1491

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

PHILADELPHIA NEWSPAPERS, INC., et al.

Appellants

v.

MAURICE S. HEPPS, et al.

Appellees and
Cross-Appellants

On Appeal From the Judgment of the
Supreme Court of Pennsylvania

JURISDICTIONAL STATEMENT ON CROSS APPEAL

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QUESTION PRESENTED

Where a defamatory publication is not hot news, and contains obviously serious charges with potential for great harm to a private figure, has a private figure plaintiff produced evidence sufficient to submit the issue of punitive damages to the jury when he shows:

(a) that the defendant-reporters did not interview plaintiff before publication solely because of their preconceived notion that he would not be objective or truthful;

(b) that the defendant-reporters consistently failed to pursue or question the most obvious available sources of corroboration or refutation;

(c) that the defendant-reporters used quotations out-of-context and

distorted other information to further their predetermined theme;

(d) that the defendant-reporters, after publication of their first article, refused to investigate the truth of what they had written even after being told by plaintiff that their statements were untrue, and then republished those false statements in subsequent articles; and

(e) that the defendant-newspaper had no guidelines or procedures to conduct an editorial review of such stories for accuracy.

CITATIONS TO OPINIONS

The Opinion of the Supreme Court of Pennsylvania, which appears in the Appendix to the Jurisdictional Statement of Appellants, is reported at _____ Pa. _____, 485 A.2d 374 (1984).

The Opinion of the trial court, which also appears in the Appendix to the Jurisdictional Statement of Appellants, has not been officially reported. An earlier opinion of the trial court, dealing with pretrial discovery matters, is reported at 3 Pa. D. & C. 3d 693 (Chester County, 1977).

Since the Appendix to the Jurisdictional Statement on Cross-Appeal would be identical to that contained in Appellants' Jurisdictional Statement, cross-appellants are not attaching an Appendix hereto, but incorporate Appellants' Appendix by reference.

LIST OF ALL PARTIES

The parties to the proceeding in the Supreme Court of Pennsylvania were as follows:

Appellants, Cross-Appellees:	Philadelphia Newspapers, In William Ecenbarger William Lambert
and	
Appellees, Cross-Appellants:	Maurice S. Hepps General Programming, Inc. A. David Fried, Inc. Brookhaven Beverage Distributors, Inc. Busy Bee Beverage Co. Almik, Inc. Lackawanna Beverage Distributors N.F.O., Inc. Elemar, Inc.1/

1/ None of the corporate appellees/cross-appellants has any parent, subsidiary, or affiliated corporations.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
CITATIONS TO OPINIONS	iii
LIST OF ALL PARTIES	iv
STATEMENT OF JURISDICTIONAL GROUNDS	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	4
STATEMENT OF THE CASE	4
A. Procedural History	4
B. Facts	7
REASONS WHY THE QUESTION PRESENTED ON CROSS APPEAL IS SUBSTANTIAL	14
CONCLUSION	18
PROOF OF SERVICE	20

TABLE OF AUTHORITIES

Page

Cases:

Bose Corp. v. Consumers Union of United States, Inc., ____ U.S. ____, 104 S. Ct. 1949 (1984)..... 14, 15

DiLorenzo v. New York News, Inc., 78 App. Div. 2d 669, 432 N.Y.S. 2d 483 (1980)..... 17

Goldwater v. Ginzburg, 414 F.2d 324 (2d Cir. 1969) cert. denied, 396 U.S. 1049 (1970)..... 16

Herbert v. Lando, 441 U.S. 153 (1979)..... 15, 16

Hepps v. Philadelphia Newspapers, Inc., 3 Pa. D. & C. 3d 693 (1977)..... 5

Kuhn v. Tribune Republican Publishing Co., ____ Colo. ____, 637 P.2d 315 (1981)..... 17

Rinaldi v. Viking Penguin, 101 Misc. 2d 928, 422 N.Y.S. 2d 552 (1979), mod., 73 App. Div. 2d 43, 425 N.Y.S. 2d 101 (1980), aff'd, 52 N.Y. 2d 422, 438 N.Y.S. 2d 436, 420 N.E. 2d 377 (1981)..... 17

TABLE OF AUTHORITIES (Continued)

Page

Statutes:

42 Pa. C.S.A. §772(7) 1

28 U.S.C. §1257(2) 2

STATEMENT OF JURISDICTIONAL GROUNDS

The underlying action is a suit for defamation by private figures against media defendants. The jury returned a verdict for defendants after the trial judge sua sponte declared unconstitutional a state statute placing on defendants the burden of proving truth, and instructed the jury that plaintiffs had the burden of proving falsity. Prior to submitting the case to the jury, the trial judge entered a directed verdict in favor of defendants on the issue of punitive damages. From the trial court's denial of post-trial motions, plaintiffs filed a direct appeal to the Pennsylvania Supreme Court pursuant to 42 Pa. C.S.A. §772(7). On December 14, 1984, the Pennsylvania Supreme Court reversed the decision of the trial court, and ordered a

new trial, on the ground that the Pennsylvania statute was constitutional. In its Opinion and Judgment, the Pennsylvania Supreme Court affirmed the trial court's refusal to submit the issue of punitive damages to the jury.

As set forth in the Statement of Jurisdictional Grounds in Appellant's Jurisdictional Statement, jurisdiction over the appeal is conferred by 28 U.S.C. §1257(2) in that there is drawn into question the validity of a state statute as being repugnant to the Constitution of the United States, and the decision of the Pennsylvania Supreme Court was in favor of the statute's constitutionality.

This cross-appeal is being filed alternatively, since appellees are simultaneously filing their motion to dismiss appeal or

affirm judgment. However, if the Court notes probable jurisdiction and grants plenary consideration of the questions raised by the appeal, then appellees request that the Court also grant plenary consideration of the question raised by this cross-appeal.

There is no independent jurisdictional basis for the question presented by this cross-appeal. There is no statute or rule of court indicating whether, in such a case, the question should be presented by cross-appeal or by petition for a writ of certiorari. However, the cross-appeal has been timely filed pursuant to Rule 12.4 in that appellees received the Jurisdictional Statement on March 18, 1985. If the Court determines that the proper procedure for raising the issue stated in this cross-appeal is by cross-petition for a writ of

certiorari, cross-appellants request the Court to consider this Jurisdictional Statement on cross-appeal as a cross-petition for a writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

None.

STATEMENT OF THE CASE

A. Procedural History

This is a private figure libel action against media defendants. Plaintiffs were Maurice S. Hepps, the co-founder of General Programming, Inc. ("GPI"), GPI, and several independent corporations which operated beer and beverage distributorships as franchisees of GPI. Defendants were two reporters and Philadelphia Newspapers, Inc. ("PNI"), the publisher of the Philadelphia Inquirer. The thrust of the news articles

in suit was that plaintiffs and their businesses were connected with the Mafia.

During the lengthy pre-trial discovery, the trial judge issued an opinion precluding plaintiffs from conducting any discovery regarding sources of information upon which defendants relied in publishing the articles. Hepps v. Philadelphia Newspapers, Inc., 3 Pa. D. & C. 3d 693 (1977).

Trial began on June 8, 1981. At the close of plaintiffs' case, the trial court, upon motion, dismissed plaintiffs' claims for punitive damages on the ground that plaintiffs had failed to adduce sufficient evidence to raise a triable issue of fact as to whether defendants acted with "actual malice." The remaining issues were submitted to the jury, after the trial judge instructed the jury that plaintiffs had the burden of proving falsity, declaring sua

sponte a Pennsylvania statute to the contrary unconstitutional in the process. The jury returned a general verdict for defendants.

Plaintiffs filed timely motions for new trial raising, inter alia, the dismissal of their claim for punitive damages.
The motion was denied, and a timely appeal taken directly to the Pennsylvania Supreme Court, where the issue of punitive damages was again raised. In its Opinion of December 14, 1984, the Pennsylvania Supreme Court reversed and remanded for a new trial on the ground that the Pennsylvania statute placing the burden of proving truth on a defendant was constitutional. However, that court also affirmed the dismissal of plaintiffs' claims for punitive damages, holding:

> [i]n the instant matter there was no basis for the jury to have concluded that the publication was

made with the knowledge of the falsity of its content. While the plaintiff attempted to show that the dissemination was made with reckless disregard of the truth of its content, it is equally apparent that a jury issue was not created under the clear and convincing test required for such an award of damages.

A-26.[2]/

B. Facts

Between May 5, 1975 and May 2, 1976, a series of five investigative news articles were published in the Philadelphia Inquirer concerning plaintiffs, who at that time were known as "Thrifty Beverage" or "Thrifty." The thrust of the articles was:

(a) Former State Senator Frank Mazzei, a convicted felon, used improper and illegal

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2/ Page references are to the Appendix to Appellants' Jurisdictional Statement.

political influence to allow the Thrifty chain, in which he owned an interest, to continue to do business despite the fact that it was operating in violation of state law;

(b) Senator Mazzei's motivation for protecting Thrifty was not limited to his financial interest, but also extended to the fact that the chain had a variety of ties to the Mafia, and may even have been a Mafia-front organization, and Senator Mazzei himself was close to or owed allegiance to the Mafia; and

(c) Therefore, Thrifty was closely connected to organized crime.

Throughout the articles, and during the trial, the reporters referred to unidentified confidential sources upon which the most damaging statements were based. Because of the Pennsylvania Shield Law, plaintiffs were not permitted to learn the identity of these sources.

During trial, plaintiffs attempted to refute the thrust of the articles with evidence showing they were not connected with organized crime, they were not operating in violation of state law, and Senator Mazzei had no financial interest in their operations, and had not used improper political influence to keep them in business. On the question of actual malice, applicable to the issue of punitive damages, plaintiffs offered evidence showing the following:

1. The stories were written in a manner calculated to invite a factual inference that the

Philadelphia Inquirer had uncovered a Mafia-infiltrated commercial enterprise which was receiving favorable treatment from state government.

2. The reporters, in particular Mr. Ecenbarger, relied primarily on their recollection, without consulting their own files or past articles they had written, insofar as Thrifty was concerned.

3. Ecenbarger, the principal reporter, had prior knowledge of many of the pertinent facts, through attendance at legislative hearings and review of a transcript of those hearings, and otherwise, and one of the plaintiffs, Mr. Hepps, also testified that, on at least one occasion prior to any of the articles, he

explained the whole entirely innocent background of Thrifty to Ecenbarger.

4. Despite many opportunities, the reporters did not try to interview Mr. Hepps or anyone else connected with Thrifty concerning the serious allegations of the articles, because of their preconceived notion that those persons would not be objective or truthful.

5. Consistently, the most obvious available sources of corroboration or refutation were not pursued or questioned, despite Ecenbarger's admitted obligation to explore and inform himself about contrary views.

6. Ecenbarger's technique was to ask only questions designed to elicit

information that would be consistent with his "suspicion" of or predisposition to uncover corruption.

7. Ecenbarger intentionally distorted comments by Mr. Hepps, thereby entirely twisting their meaning.

8. Ecenbarger misused a statement by federal informants that they had no evidence of a financial interest by Mazzei in Thrifty in such a way ("no visible financial link") that even the Inquirer's headline writer interpreted it to mean that Thrifty was Mazzei's business.

9. The Inquirer failed to publish a correction under the "Clearing the Record" column of the admittedly false headline "STATE SENATOR USED POLITICAL MUSCLE TO AID HIS BUSINESS."

10. Ecenbarger blatantly editorialized and made suggestions of impropriety, such as by placing quotation marks around the word "stipulation", with a total inability to explain why he did so.

11. Ecenbarger freely took information from sources and expanded upon it in unwarranted fashion.

12. Ecenbarger failed to investigate even after Mr. Hepps called him upon publication of the first article and told him, in chapter and verse, why the article was false.

13. Ecenbarger consciously refused in each successive story after the first one to publish the fact that Mr. Hepps denied the allegations which were being made against him and Thrifty.

14. There was a total absence at the Inquirer of any guidelines or procedures to insure that a careful, complete investigation had been made to establish the existence and credibility of confidential sources upon whom a reporter had based his story, and to conduct an editorial review of the stories for truthfulness and accuracy.

REASONS WHY THE QUESTION PRESENTED ON CROSS-APPEAL IS SUBSTANTIAL

This Court recently reaffirmed the rule that "[t]he burden of proving 'actual malice' requires the plaintiff to demonstrate with clear and convincing evidence that the defendant realized his statement was false or that he subjectively entertained serious doubt as to the truth of his statement." Bose Corp. v. Consumers Union

of United States, Inc., _____ U.S. _____, 104 S. Ct. 1949, 1965 n.30 (1984). This extraordinarily heavy burden can be met by inquiring directly into the defendant's state of mind, as highlighted in Herbert v. Lando, 441 U.S. 153 (1979). However, it can also be met by proof "...in the form of objective circumstances from which the ultimate fact could be inferred...." Id., at 160.

Although the Court on numerous occasions has stated what is not proof of actual malice, it has rarely provided guidance to the lower federal and state courts as to what may constitute sufficient objective circumstances from which "actual malice" may be inferred.

The Opinion of the Pennsylvania Supreme Court reflects no analysis of the permissible inferences which the jury might have

drawn from the objective circumstances which plaintiffs proved in their effort to show actual malice. A-23 - A-27. It therefore appears that the court based its decision on the absence of subjective evidence going to the reporters' state of mind. The absence of such evidence in a libel case is not surprising, since defendants in libel cases can be expected to assert their good faith belief in the truth of what they have written, Herbert v. Lando, 441 U.S. at 170, and since plaintiffs here were precluded from inquiring into the confidential sources of defendants' stories.

Other courts have found actual malice from objective circumstances. Goldwater v. Ginzburg, 414 F.2d 324, 337 (2d Cir. 1969), cert. denied, 396 U.S. 1049 (1970) ("evidence of a predetermined and preconceived

plan" and "statements out of context in order to support his predetermined result"); Rinaldi v. Viking Penguin. 101 Misc. 2d 928, 422 N.Y. S.2d 552 (1979), mod., 73 App. Div. 2d 43, 425 N.Y.S. 2d 101 (1980), aff'd., 52 N.Y. 2d 422, 438 N.Y.S. 2d 436, 420 N.E. 2d 377 (1981) (notice from plaintiff prior to subsequent publication that the original publication was inaccurate); Kuhn v. Tribune-Republican Publishing Co., _____ Colo. _____, 637 P.2d 315 (1981); DiLorenzo v. New York News, Inc., 78 App. Div. 2d 669, 432 N.Y.S. 2d 483 (1980).

Especially in the area of investigative reporting involving serious charges with potential for great harm, this Court should provide guidance to the lower courts as to the categories of objective circumstances that will support a finding of actual

malice. Such rules, even if stated in general terms, will lead to greater predictability and consistency of rulings throughout the country, and ultimately may reduce the instances in which this Court will find it necessary to exercise de novo review of the evidence.

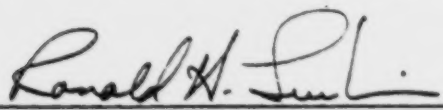
CONCLUSION

Appellees/Cross-appellants submit as their principal position that this Court should dismiss Appellants' appeal, or affirm the judgment of the Pennsylvania Supreme Court.

If, however, the Court grants plenary review to Appellants, then Appellees request that similar plenary consideration, with briefs on the merits and oral argument, also be granted to review the

question presented in this cross-appeal.

Respectfully submitted,



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Date: April 11, 1985

CERTIFICATE OF SERVICE

RONALD H. SURKIN, a member of the Bar of the Supreme Court of the United States, hereby certifies that three copies of the attached Jurisdictional Statement On Cross-Appeal were served by hand delivery on April 11, 1985 on counsel for appellants as follows:

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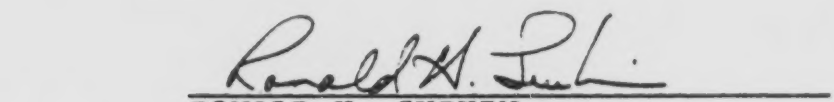
The foregoing individual is the only person required to be served.



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